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Nos. 96-188

IN THE
Supreme Court of the United States

OCTOBER TERM, 1996

GENERAL ELECTRIC COMPANY, ET AL.,
Petitioners,

v.

ROBERT K. JOINER, ET AL.,
Respondents.

**On Writ Of Certiorari To The
United States Court Of Appeals
For the Eleventh Circuit**

**MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF
AND AMICUS CURIAE BRIEF OF
THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA
IN SUPPORT OF THE RESPONDENTS**

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**MOTION OF
ASSOCIATION OF TRIAL LAWYERS OF AMERICA
FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE**

Pursuant to Rule 37.3(b) of the Rules of this Court, the Association of Trial Lawyers of America ("ATLA") respectfully moves this Court for leave to file the accompanying brief as amicus curiae. Petitioner, through counsel, has consented to the filing of this brief, Respondent has denied consent.

ATLA is a national voluntary bar association whose approximately 50,000 members primarily represent injured plaintiffs in civil actions, and defendants in criminal prosecutions. Due to the increasing importance of scientific evidence in our justice system, trial lawyers regularly face the

issue of admissibility of scientific expert testimony. At the same time, ATLA has committed itself to the preservation of the right to trial by jury guaranteed by the Constitution.

ATLA participated as an amicus curiae in the case of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), where the Court set forth standards of admissibility of scientific evidence. In this case, where the Court is presented with the question of the standard of appellate review of such decisions, similar concerns are present.

ATLA believes that the accompanying brief amicus curiae will assist the Court in addressing this issue. The impact of the Court's decision in this case will clearly extend far beyond the parties themselves. ATLA is particularly concerned that appellate review of rulings excluding expert testimony be sufficiently rigorous to safeguard litigants' right to trial by jury. ATLA has undertaken extensive research into the history and current performance of the jury system and brings a broader perspective to this issue than that of the parties.

For these reasons, the Association of Trial Lawyers of America respectfully moves the Court for leave to file the accompanying brief in this case as amicus curiae.

Respectfully submitted,

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TABLE OF CONTENTS
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TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
IDENTITY AND INTEREST OF AMICUS CURIAE	1
SUMMARY OF THE ARGUMENT	2
ARGUMENT	4
I REVERSAL OF THE DISTRICT COURT'S EXCLUSION OF EXPERT TESTIMONY WAS AN APPROPRIATE APPLICATION OF THE ABUSE OF DISCRETION STANDARD.	4
A. Appellate Courts Have Traditionally Protected the Role of the Jury to Assess the Weight and Credibility of Witnesses.	4
B. Courts Properly Evaluate the Reliability of the Scientific Methodology Underlying Expert Opinion, But the Weight and Credibility of the Expert's Conclusions Are Matters for the Jury.	5
1. <i>Appellate Courts Have Distinguished Methodology From Conclusion in Defining the Proper Roles of Judge and Jury.</i>	5
2. <i>This Court's Decision in Daubert Reaffirmed the Methodology/Conclusion Distinction Under Rule 702.</i>	8
C. The Court of Appeals Properly Applied the Methodology/Conclusion Distinction Under an Abuse of Discretion Standard in this Case.	10
II CLOSE SCRUTINY OF RULINGS EXCLUDING EXPERT TESTIMONY IS NECESSARY TO EFFECTUATE THE LIBERAL THRUST OF THE RULES OF EVIDENCE, ACCESS TO JUSTICE AND THE CONSTITUTIONAL ROLE OF THE JURY.	14

A. Close Scrutiny of Rulings Excluding Expert Testimony Effectuates the Liberal Thrust of the Federal Rules of Evidence.....	14
B. Close Scrutiny of Rulings Excluding Expert Testimony is Necessary to Preserve Access to Justice.....	16
C. Close Scrutiny of Rulings Excluding Expert Testimony is Necessary to Preserve the Constitutional Role of the Jury.....	17
III. FEARS OF JURY INCOMPETENCE TO ASSESS THE WEIGHT AND CREDIBILITY OF EXPERT TESTIMONY ARE UNFOUNDED.....	22
CONCLUSION.....	25

TABLE OF AUTHORITIES

Cases

<i>Ambrosini v. Labarraque</i> , 101 F.3d 129 (D.C. Cir. 1996) . . .	9, 20
<i>Anderson v. Liberty Lobby, Inc.</i> , 477 U.S. 242 (1986)	4
<i>Barefoot v. Estelle</i> , 463 U.S. 880 (1983)	5, 22
<i>Beech Aircraft Corp. v. Rainey</i> , 488 U.S. 153 (1988)	8, 15
<i>Brotherhood of Railway Trainmen v. Virginia ex rel. Virginia State Bar</i> , 377 U.S. 1 (1964)	17
<i>Browning-Ferris, Indus. v. Kelco</i> , 492 U.S. 257 (1989)	20
<i>Cella v. United States</i> , 998 F.2d 418 (7th Cir. 1993)	7
<i>Christophersen v. Allied-Signal Corp.</i> , 939 F.2d 1106 (5th Cir. 1991)	6
<i>Crane v. Morris' Lessee</i> , 31 U.S. 610 (1834)	4
<i>Daubert v. Merrell Dow Pharmaceuticals, Inc.</i> , 509 U.S. 579 (1993)	passim
<i>Dimick v. Schiedt</i> , 293 U.S. 474 (1953)	20
<i>Evans v. Eaton</i> , 16 U.S. 454 (1818)	4
<i>Ferebee v. Chevron Chemical Co.</i> , 736 F.2d 1529 (D.C. Cir. 1984)	6
<i>Fierro v. Gomez</i> , 865 F. Supp. 1387 (N.D. Cal. 1994)	10
<i>Frye v. United States</i> , 293 F. 1013 (D.C. Cir. 1923)	5
<i>Grand Chute v. Winegar</i> , 82 U.S. 373, 375 (1872)	20
<i>Granfinanciera S.A. v. Nordberg</i> , 492 U.S. 33 (1989)	18
<i>Hamling v. United States</i> , 418 U.S. 87 (1974)	11
<i>Hines v. Consolidated Rail Corp.</i> , 926 F.2d 262 (3d Cir. 1991)	6
<i>Ibn-Tamas v. United States</i> , 407 A.2d 626 (D.C. 1979)	8

<i>In re Paoli R.R. Yard PCB Litigation</i> , 35 F.3d 717 (3d Cir. 1994)	10
<i>In re Swine Flu Immunization Product Liability Litigation</i> , 533 F. Supp. 567 (D. Colo. 1980)	7
<i>Knight v. Otis Elevator Co.</i> , 596 F.2d 84 (3d Cir. 1979)	17
<i>Lind v. Schenley Indus., Inc.</i> , 278 F.2d 79 (3d Cir.)	21
<i>Logan v. Zimmerman Brush Co.</i> , 455 U.S. 422 (1982)	16
<i>Lyon v. Mutual Benefit Assoc.</i> , 305 U.S. 484 (1939)	20
<i>Marbury v. Madison</i> , 5 U.S. (1 Cranch) 137 (1803)	16
<i>Missouri Pacific Ry. Co. v. Humes</i> , 115 U.S. 512 (1885)	16
<i>Osburn v. Anchor Laboratories, Inc.</i> , 825 F.2d 908 (5th Cir. 1987)	6
<i>Oxendine v. Merrell Dow Pharmaceuticals, Inc.</i> , 506 A.2d 1100 (D.C. 1986)	8
<i>Parklane Hosiery Co., Inc. v. Shore</i> , 439 U.S. 322 (1979)	21
<i>Patrick v. South Central Bell Tel. Co.</i> , 641 F.2d 1192 (6th Cir. 1980)	7
<i>Peteet v. Dow Chem. Co.</i> , 868 F.2d 1428 (5th Cir. 1989)	6
<i>Rock v. Arkansas</i> , 483 U.S. 44 (1987)	15
<i>Rubanick v. Witco Chem. Co.</i> , 593 A.2d 733 (N.J. 1991)	8
<i>Tennant v. Peoria & Pekin Union Ry.</i> , 321 U.S. 29 (1944)	4
<i>United States v. Bonds</i> , 12 F.3d 540, 564 (6th Cir. 1993)	7
<i>United Transportation Union v. State Bar of Michigan</i> , 401 U.S. 576 (1971)	17
Constitutions, Statutes, and Rules	
U.S. Const., amend. VII	18

Fed. R. Civ. Pro. 38(a)	18
Federal Rule of Evidence 702	passim
Federal Rule of Evidence 803(6)	16
Federal Rule of Evidence 803(8)	16

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Cecil, Joe S., Valerie P. Hans, and Elizabeth C. Wiggins, <i>Citizen Comprehension of Difficult Issues: Lessons from Civil Jury Trials</i> , 40 Am. U. L. Rev. 728 (1991)	23, 24
Development in the Law, <i>Confronting The New Challenges Of Scientific Evidence</i> , 108 Harv. L. Rev. 1481 (1995)	5, 12
Developments in the Law -- the Civil Jury: The Jury's Capacity to Decide Complex Civil Cases, 110 Harv. L. Rev. 1489 (1997)	22
Diamond, Shari Seidman, and Jonathan D. Casper, <i>Blindfolding the Jury to Verdict Consequences, Damages, Experts, and the Civil Jury</i> , 26 Law & Soc. Rev. 513 (1992)	24
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Hans, Valerie P., <i>The Jury's Response to Business and Corporate Wrongdoing</i> , 52 Law & Contemp. Pblms. 177 (1989)	24
Henderson, Edith Guild, <i>The Background of the Seventh Amendment</i> , 80 Harv. L. Rev. 289 (1966).....	18
Higginbotham, Patrick., <i>Continuing the Dialogue: Civil Juries and the Allocation of Judicial Power</i> , 56 Texas L. Rev. 47 (1977).....	19
Jacobs, Michael S., <i>Testing the Assumptions Underlying the Debate About Scientific Evidence: A Closer Look at Juror "Incompetence" and Scientific "Objectivity,"</i> 25 Conn. L. Rev. 1083 (1993).....	22
Jay P. Kesan, <i>An Autopsy of Scientific Evidence in a Post-Daubert World</i> , 84 Geo. L.J. 1985 (1996).....	12
Landsman, Stephan, <i>The Civil Jury In America: Scenes From an Unappreciated History</i> , 44 Hastings L.J. 579 (1993)	18
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Pound, Roscoe, <i>THE DEVELOPMENT OF CONSTITUTIONAL GUARANTEES OF LIBERTY</i> (1957)	18
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Roisman, Anthony Z., <i>Conflict Resolution In The Courts: The Role Of Science</i> , 15 Cardozo L. Rev. 1945 (1994)	24

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Story, Joseph, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (R. Rotunda & J. Nowak eds. 1987).....	18
THE COMPLETE ANTI-FEDERALIST 49 (An Old Whig)	19
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Wigmore, John H., <i>Evidence</i> (1940).....	14
Wigmore, John H., <i>Evidence in Trials at Common Law</i> (Chadbourn rev. 1981)	5
Wolfram, Charles, <i>The Constitutional History of the Seventh Amendment</i> , 57 Minn. L. Rev. 639 (1973).....	18

IDENTITY AND INTEREST OF AMICUS CURIAE

The Association of Trial Lawyers of America (ATLA) is a voluntary national bar association whose 50,000 members primarily represent injured persons.

A motion for leave to file this brief of amicus curiae has been filed with this Court.

Pursuant to Rule 37.6, Amicus declares that no counsel for a party authored any part of this brief, nor did any person or entity other than

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The question presented to the Court in this case is of overriding importance to civil and criminal trial practitioners. This Court has assigned the role of "gatekeeper" to district courts in cases involving scientific evidence. Because that role necessarily requires judges to determine whether litigants may present crucial scientific evidence to the jury, appellate courts must be able to preserve the role of the jury against overreaching by trial judges.

SUMMARY OF THE ARGUMENT

I. The role of evaluating the credibility and weight of testimony, including that of expert witnesses, is allocated to the jury. Appellate courts have historically and traditionally protected the jury's role when reviewing trial court decisions excluding testimony.

In the context of scientific testimony, courts determining admissibility have examined the methodology underlying an expert's testimony for reliability. It is for the jury, however, to decide whether the conclusions based on satisfactory methodologies are credible or entitled to weight. The Court's decision in *Daubert* preserved the methodology/conclusion distinction as the boundary between the roles of judge and jury.

In this case, the trial judge crossed that boundary. The court excluded the testimony of plaintiffs' experts, not based on assessment of the validity of their underlying methodology or procedures, but because the court did not believe the conclusions drawn by the experts. Reversal by the court of appeals was an appropriate exercise of "abuse of discretion" review.

amicus curiae, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

II. The fact that the court of appeals scrutinizes rulings excluding expert testimony more closely than rulings admitting such evidence does not create an impermissible "asymmetry" under the Federal Rules of Evidence. The Rules themselves not only liberalized the admissibility of expert opinion, but several rules are explicitly tilted in favor of admissibility of relevant evidence.

In addition, the consequences of erroneously excluding expert evidence implicate the fundamental right of access to justice. Because scientific evidence has become crucial in many areas, a ruling against admissibility frequently sounds the death knell for a plaintiff's cause of action. Moreover, civil plaintiffs generally do not have access to the numbers of experts readily available to manufacturers and other corporate defendants. Closer scrutiny of decisions to exclude expert testimony is warranted to prevent the courthouse door from being shut in error.

Similarly, erroneous exclusion of expert testimony impinges upon the constitutional right to trial by jury. The Seventh Amendment was designed as a safeguard against overreaching and abuse by federal judges. Where judges serve as "gatekeepers," determining whether scientific evidence may be presented to the jury, effective appellate review is necessary to prevent judges from exceeding the scope of their discretion and usurping the functions of the jury.

III. Our justice system is premised on the ability of jurors to perform their responsibility as factfinder, even in areas of considerable scientific complexity. Arguments against close appellate review of rulings excluding evidence reflect, in part, a lack of confidence in the ability of jurors. Empirical studies, however, demonstrate that these fears are unfounded and that jurors evaluate the weight and credibility of scientific evidence as rationally as judges.

ARGUMENT

REVERSAL OF THE DISTRICT COURT'S EXCLUSION OF EXPERT TESTIMONY WAS AN APPROPRIATE APPLICATION OF THE ABUSE OF DISCRETION STANDARD.

A. Appellate Courts Have Traditionally Protected the Role of the Jury to Assess the Weight and Credibility of Witnesses.

One of the few bright lines in American jurisprudence recognizes that courts decide issues of law, while issues of fact are reserved for the jury. From the earliest American cases, the jury's responsibility as factfinder has included the assessment of the weight and credibility of the testimony of witnesses. Appellate courts did not hesitate to reverse exclusions of witnesses that trammelled on this domain of the jury. See, e.g., *Evans v. Eaton*, 16 U.S. 454, 505 (1818); *Crane v. Morris' Lessee*, 31 U.S. 610, 620-21 (1834).

This Court has instructed:

It is the jury, not the court, which is the factfinding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions and draws the ultimate conclusion as to the facts. Its function is to select among conflicting inferences and conclusions that which it considers most reasonable. That conclusion, whether it relates to negligence, causation, or any other factual matter cannot be ignored.

Tennant v. Peoria & Pekin Union Ry., 321 U.S. 29, 35 (1944). See also *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) ("Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of the judge.").

When the witness is proffered as an expert, judges have traditionally ruled on admissibility, reserving to the jury the task of evaluating the testimony's credibility and weight. See

9 John H. Wigmore, *EVIDENCE IN TRIALS AT COMMON LAW* §§ 2549 & 2550, at 639-40 (Chadbourn rev. 1981). See also, *Development in the Law, Confronting The New Challenges Of Scientific Evidence*, 108 Harv. L. Rev. 1481, 1510-11 (1995) [Hereinafter "*New Challenges*"]

This Court has explained that "the fundamental premise of our entire system [is] that the purpose of the jury is to sort out the true testimony from the false, the important matters from the unimportant matters, and when called upon to do so, to give greater credence to one party's expert witnesses than another's." *Barefoot v. Estelle*, 463 U.S. 880, 902 (1983).

B. Courts Properly Evaluate the Reliability of the Scientific Methodology Underlying Expert Opinion, But the Weight and Credibility of the Expert's Conclusions Are Matters for the Jury.

1. Appellate Courts Have Distinguished Methodology From Conclusion in Defining the Proper Roles of Judge and Jury.

Prior to the 20th Century, courts generally did not impose greater reliability requirements on expert testimony than on testimony from other witnesses. Jack B. Weinstein, *Improving Expert Testimony*, 20 U. Rich. L. Rev. 473, 474-75 (1986). With the increasing importance of scientific evidence in modern trials, however, courts demanded of expert opinion some indicia of reliability in addition to relevance. *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), "ushered in a new era of judicial regulation of novel scientific evidence." *New Challenges* at 1486.

In exercising this control, both before and after enactment of the Federal Rules of Evidence, courts drew a clear distinction between the methodology relied upon by an expert and the conclusions drawn from that methodology. It was for judges to assess the reliability or "general acceptance" of the scientific tests or methodology relied upon by the expert. Whether the expert's conclusions were credible and

whether they should be given great or little weight was for the jury to decide.

The methodology/conclusion distinction has been applied by courts in a variety of circumstances to preserve the jury's role. For example, in *Ferebee v. Chevron Chemical Co.*, 736 F.2d 1529 (D.C. Cir. 1984), where experts of opposing parties relied on essentially the same diagnostic methodology, but differed on the conclusions they drew from test results and other information, the court recognized that it was for the jury to determine which was more credible.

The court in *Hines v. Consolidated Rail Corp.*, 926 F.2d 262, 274 (3d Cir. 1991) ruled expert testimony admissible, stating that "though the expert's opinion could be considered to be 'novel,' it appears that, under the Rule 702 standard, his methods were not."

The Fifth Circuit has addressed this issue on several occasions:

An expert's opinion need not be generally accepted in the scientific community before it can be sufficiently reliable and probative to support a jury finding What is necessary is that the expert arrived at his causation opinion by relying on *methods* that other experts in his field would reasonably rely upon in forming their own, possibly different opinions, about what caused the patient's disease.

Osburn v. Anchor Laboratories, Inc., 825 F.2d 908, 915 (5th Cir. 1987). See also *Peteet v. Dow Chemical Co.*, 868 F.2d 1428, 1433 (5th Cir. 1989)(As long as an expert's methodology is well-founded, the nature of the expert's conclusion is irrelevant to admissibility, even if it is controversial or unique). The court reaffirmed its position in *Christophersen v. Allied-Signal Corp.*, 939 F.2d 1106, 1111 & n.9 (5th Cir. 1991)(en banc), cert. denied, 112 S. Ct. 1280 (1992), stating that the proper analysis is not whether an expert's conclusion is correct, but "whether in reaching his

conclusion, the witness used a well-founded methodology or mode of reasoning." In such a case, the "jury must be allowed to make credibility determinations and weigh the conflicting evidence."

In *United States v. Bonds*, 12 F.3d 540, 564 (6th Cir. 1993), the court ruled that a method of estimating DNA matches was admissible. Defendant's objection that the study did not account for ethnic substructuring was "a dispute over the accuracy of the probability results" that went to the weight of the evidence rather than to its admissibility. See also *Patrick v. South Central Bell Tel. Co.*, 641 F.2d 1192, 1197 (6th Cir. 1980)(where opposing experts disagreed as to calculations of height of utility wire; "credibility judgments of contradictory testimony" by experts are the province of the jury).

Similarly, the court in *Cella v. United States*, 998 F.2d 418, 426 (7th Cir. 1993), stated that "[a]lthough the expert's conclusion differs from those of the defendant's medical experts, he has utilized an accepted methodology in reaching his conclusion." See also *In re Swine Flu Immunization Product Liability Litigation*, 533 F. Supp. 567, 578-79 (D. Colo. 1980)(expert testimony that vaccine caused Guillain-Barre Syndrome, based on epidemiological studies, was admissible where the methodology used was generally accepted; the fact that the results of the study have not been generally accepted by the medical community goes to weight).

State courts have also employed the methodology/conclusion distinction as a boundary between the roles of judge and jury with respect to scientific testimony. As the District of Columbia Court had occasion to explain, admissibility

begins -- and ends -- with a determination of whether there is general acceptance of a particular scientific methodology, not an acceptance, beyond that, of particular study results based on that methodology.

Ibn-Tamas v. United States, 407 A.2d 626, 639 (D.C. 1979). Where opposing experts disagree as to how epidemiological and other data should be interpreted it is for the jury to decide the issue. *Oxendine v. Merrell Dow Pharmaceuticals, Inc.*, 506 A.2d 1100, 1110 (D.C. 1986). See also *Rubarick v. Witco Chem. Co.*, 593 A.2d 733, 747-48 (N.J. 1991) (Adopting "methodology-based" test which looks to "whether the scientific knowledge is sufficiently founded on a sound methodology, leaving the decision to credit the theory to the finder of fact.")

2. This Court's Decision in *Daubert* Reaffirmed the Methodology/Conclusion Distinction Under Rule 702.

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), this Court held that the *Frye* standard did not survive the enactment of the Federal Rules of Evidence. The rigid general acceptance test was "at odds with the 'liberal thrust' of the Rules and their 'general approach of relaxing the traditional barriers to opinion testimony.'" *Id.* at 588 (quoting *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 169 (1988).) Nevertheless, the Court did insist that "Rule 702 . . . clearly contemplates some degree of regulation of the subjects and theories about which an expert may testify." *Id.* at 589.

At several places in its opinion, the *Daubert* court made it clear that a trial judge exercising this "gatekeeping" function must focus on the methodology underlying the expert's conclusion. For example, "to qualify as 'scientific knowledge,'" under Rule 702, "an inference or assertion must be derived by the scientific method." *Id.* at 590. A "key question" is whether a theory or technique "can be (and has been) tested," that is, its "falsifiability." *Id.* at 593.

In addition, the Court noted that "scientists typically distinguish between 'validity' (does the principle support what it purports to show?) and 'reliability' (does application of the principle produce consistent results?). . . . In a case involving

scientific evidence, evidentiary reliability will be based upon scientific validity." *Id.* at 590 n.9. The distinction between "validity" and "reliability" -- that is, between a scientific test or principle and its application in the particular case -- roughly conforms to the methodology/conclusion distinction. See Paul C. Giannelli, *The Admissibility of Novel Scientific Evidence: Frye v. United States, a Half-Century Later*, 80 Colum. L. Rev. 1197, 1201 n. 20 (1980).

"Faced with a proffer of expert scientific testimony," the Court instructed, the trial judge must determine "whether the reasoning or methodology underlying the testimony is scientifically valid." *Daubert*, 509 U.S. at 592-93. When testimony satisfies this empirical validation test, the testimony is admissible even if the witness's conclusion is novel and controversial. Edward J. Imwinkelried, *The Daubert Decision: Frye Is Dead, Long Live the Federal Rules of Evidence*, 29 Trial 60, 64 (Sept. 1993).

Finally, the Court made it unmistakably clear that their discretion as gatekeepers does not extend to evaluating the conclusions an expert may draw based on a scientifically valid principle or procedure:

The inquiry envisioned by Rule 702 is, we emphasize, a flexible one. Its overarching subject is the scientific validity and thus the evidentiary relevance and reliability of the principles that underlie a proposed submission. The focus, of course, must be solely on principles and methodology, not on the conclusions that they generate.

509 U.S. at 594-95 (emphasis added).

Federal courts have correctly viewed *Daubert* as reaffirming the methodology/conclusion distinction. See *Ambrosini v. Labarraque*, 101 F.3d 129 (D.C. Cir. 1996) ("Daubert instructs that the admissibility inquiry focuses not on conclusions, but on approaches . . . 'employ[ing] scientifically valid methodologies.'"). Questions of the accuracy of scientific testing should "be addressed through

determination of the weight to be accorded the testimony, rather than through the threshold determination of admissibility." *Fierro v. Gomez*, 865 F. Supp. 1387, 1395 n.7 (N.D. Cal. 1994). *Cf. In re Paoli R.R. Yard PCB Litigation*, 35 F.3d 717, 746 (3d Cir. 1994) ("Plaintiffs are correct, of course, that *Daubert* requires the judge's admissibility decision to focus not on the expert's conclusions but on his or her principles and methodology." The court added, however, that it viewed the distinction as having "limited practical import.").

C. The Court of Appeals Properly Applied the Methodology/Conclusion Distinction Under an Abuse of Discretion Standard in this Case.

The court of appeals in this case did no more than determine that the trial judge exceeded the bounds of its discretion so clearly drawn in *Daubert*.

Robert Joiner alleged that he developed small cell cancer as a result of his exposure to PCBs in the course of his employment servicing electrical transformers. On the crucial issue of whether PCBs do in fact initiate or promote cancer in humans, Joiner proffered the expert testimony of qualified experts. Those witnesses testified based on the results of a number of studies, including tests on mice and epidemiological studies. The district court ruled the testimony inadmissible. *Joiner v. General Electric Co.*, 864 F. Supp. 1310, 1327 (N.D. Ga. 1994)

Although the court of appeals gave a "hard look" under its abuse of discretion standard, see 78 F.3d at 535 (Smith, J., dissenting), the court did not need to look far. The trial judge gave no attention to whether the methodologies relied upon the plaintiffs' experts are scientifically valid means of learning whether a substance like PCBs can cause cancer in humans. Indeed, the judge summarily rejected plaintiffs' attempts to establish the scientific validity of reliance on animal studies,

864 F. Supp. at 1324, or that the epidemiological studies "were conducted in a scientific manner". *Id.* at 1326.

Instead, the trial judge stated:

Defendants still persuade the court that Plaintiffs' expert testimony would not be admissible. Defendants do this by attacking the conclusions that Plaintiffs' experts draw from the studies they cite.

864 F. Supp. at 1322 (emphasis added).

The trial judge proceeded to underscore the perceived deficiencies in the studies relied upon by plaintiffs' experts, noting that there were only two animal studies and that some findings could be characterized as preliminary. Further, the judge pointed out that the epidemiological studies involved a small number of subjects or were not statistically significant or failed to control for certain variables. *Id.* at 1323-26.²

These factors would have made for effective cross-examination, refutation and rebuttal by defense counsel arguing that the jury should give little or no weight to the experts' opinions. But they were not appropriate bases for the judge to determine admissibility.

Petitioners expend a great deal of effort to establish that courts generally apply the abuse of discretion or "manifestly erroneous" standard to review decisions on the admissibility of expert testimony. Pet. Br. at 22-23. However, many of the decisions they set forth involve issues of relevancy or qualifications of the expert. *Hamling v. United States*, 418 U.S. 87, 108 (1974), for example, focused on relevance. On the specific issue of the reliability of the scientific testimony, under *Frye* "[g]enerally appellate courts used a de novo standard to review admissibility decisions because they had access to the same information as the trial courts regarding

² With one exception, the district court did not examine the studies themselves, but relied on critiques of the studies provided by defendants. 864 F. Supp. at 1325 n. 27, an exercise of discretion that strikes Amicus as questionable.

the 'general acceptance' of a particular scientific method. *New Challenges* at 1526.³

In this case, however, the court of appeals stated explicitly that the "district court's ruling on the admissibility of evidence is reviewed for abuse of discretion." 78 F.3d at 529. The court added that "[b]ecause the Federal Rules of Evidence governing expert testimony display a preference for admissibility, we apply a particularly stringent standard of review to the trial judge's exclusion of expert testimony." *Id.* Nevertheless, the court of appeals did not "substitute[] its own judgment for that of the District Court," as Petitioner claims. Brief for Pet. at 20. Rather, the court clearly focused on whether the trial judge properly performed its responsibility under *Daubert*.

The court explained that, under *Daubert*:

"it is important for trial courts to keep in mind the separate functions of judge and jury . . . the gatekeeping responsibility of the trial courts is not to weigh or choose between conflicting scientific opinions, or to analyze and study the science in question in order to reach its own scientific conclusions from the material in the field. Rather, it is to assure that an expert's opinions are based on relevant scientific methods, processes, and data.

³ Indeed, a number of scholars and commentators advocate de novo review of the reliability decisions of trial judges under *Daubert*. E.g. David L. Faigman, Elise Porter & Michael J. Saks, *Check Your Crystal Ball at the Courthouse Door, Please: Exploring the Past, Understanding the Present, and Worrying About the Future of Scientific Evidence*, 15 Cardozo L. Rev. 1799, 1820-21 (1994); Note, Jay P. Kesan, *An Autopsy of Scientific Evidence in a Post-Daubert World*, 84 Geo. L.J. 1985, 2040-41 (1996).

Amicus suggests, as does the dissenting Judge in this case, that the abuse of discretion standard can easily accommodate the kind of "close scrutiny" engaged in by the court of appeals here. See 78 F.3d at 535-36 (Smith, J., dissenting).

Trial judges must . . . be careful not to cross the line between deciding whether the expert's testimony is based on 'scientifically valid principles' and deciding upon the correctness of the expert's conclusions. The latter inquiry is for the jury and, therefore, judges may not implicitly factor it into their assessment of reliability.

78 F.3d at 530.

In this case, the court of appeals concluded, "the district court . . . excluded the testimony because it drew different conclusions from the research than did each of the experts." *Id.* at 533. This amounted to an abuse of discretion since, "[a]s *Daubert* makes clear, the district court may not decide whether an expert's opinions are correct, but merely whether the bases supporting the conclusions are reliable." *Id.*

The Solicitor General, as amicus, acknowledges the appropriateness of such a ruling under the abuse of discretions standard. Noting that the court of appeals indicated that "the district court misunderstood its role under *Daubert* and improperly focused on the proffered experts' 'conclusions' rather than on their 'principles and methodology.' . . . That sort of legal error would be a proper ground for reversal under an abuse-of-discretion standard." Brief for the United States as Amicus Curiae at 26: ⁴

This, Amicus submits, is precisely the decision of the court of appeals.

⁴ The Solicitor General continued: "We disagree, however, with the court of appeals' view that the district court misunderstood its role in this case." *Id.*

II. CLOSE SCRUTINY OF RULINGS EXCLUDING EXPERT TESTIMONY IS NECESSARY TO EFFECTUATE THE LIBERAL THRUST OF THE RULES OF EVIDENCE, ACCESS TO JUSTICE AND THE CONSTITUTIONAL ROLE OF THE JURY.

Petitioners complain of the court of appeals' application of "a particularly stringent standard of review to the trial judge's exclusion of expert testimony," compared to a more deferential review of a ruling admitting evidence. They argue that this "asymmetrical" approach violates accepted doctrine and *Daubert*. Pet. Br. at 40.

Amicus submits that weighty considerations of policy and constitutional imperative require an appellate standard that favors admissibility. Moreover, there are no countervailing concerns sufficient to mandate less stringent review of trial court rulings.

A. Close Scrutiny of Rulings Excluding Expert Testimony Effectuates the Liberal Thrust of the Federal Rules of Evidence.

Leading evidence scholars have long and vigorously criticized judge-made barriers to the truth-finding function of juries. See, e.g., 3 John H. Wigmore, *Evidence* §688 (1940); Morgan, *Suggested Remedy for Obstructions to Expert Testimony by Rules of Evidence*, 10 U. Chi. L. Rev. 285 (1943); Paul Rheingold, *The Basis of Medical Testimony*, 15 Vand L. Rev. 473, 475 (1962).

The enactment of the Federal Rules of Evidence in 1975 represents a general abolition of many of these common-law barriers. Albert Jenner, Chairman of the Advisory Committee on the Rules of Evidence explained to Congress:

The Advisory Committee is especially proud of the rules dealing with expert testimony. This area has become encrusted with a heavy and suffocating layer of technicalities wholly inconsistent with the simple facts of life and the intelligence of American jurors. . . .

As practical and experienced trial lawyers, we knew and, in fact have long known that intelligent jurors realize that an expert is only stating his opinion, that his testimony is to be treated as an opinion and is not binding upon the jurors and is to be judged in the light of all the evidence in the case, to be accepted or rejected by a juror as he sees fit.

Rules of Evidence, Hearings Before the Special Subcom. on Reform of Federal Criminal Laws of the House Comm. on the Judiciary, 93d Cong., 1st Sess. 87-88 (1973).

Judge Weinstein has declared:

The Federal Rules of Evidence have produced an enormous loosening up of the restrictions on the admission of expert testimony, on its basis, on its form, and on the effective utilization of such testimony once admitted. This relaxation was needed to give the trier of fact convenient access to the reliable technical knowledge that is available in our modern society.

Jack B. Weinstein, *Improving Expert Testimony*, 20 U. Rich. L. Rev. 473, 482 (1986).

This Court's decisions under the Rules have consistently upheld the Rules' preference in favor of broad admissibility of scientific evidence and confidence in the jury's ability, aided by cross-examination and the adversarial process, to carry out its factfinding function. E.g., *Rock v. Arkansas*, 483 U.S. 44, 61 (1987). In *Daubert*, the Court recognized the "liberal thrust" of the Federal Rules and their "general approach of relaxing the traditional barriers to 'opinion' testimony." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), quoting *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 169 (1988).

Indeed the Rules themselves prescribe "asymmetrical" standards favoring admissibility, even in areas committed to the sound discretion of the trial judge. Rule 403, for example, provides that relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of

unfair prejudice . . .” Rules 803(6) and 803(8) provide exceptions to the hearsay rule for business records and public records “unless the sources of information or other circumstances indicate lack of trustworthiness.”

Professor Berger, noting such examples of “presumptively admissible” evidence under the Rules, opined that the “Court’s analysis in *Daubert* suggests that scientific expert testimony requires the same treatment - the evidence should be presumed to be admissible until the opponent discharges its burden to show the contrary.” Margaret A. Berger, *Procedural Paradigms For Applying The Daubert Test*, 78 Minn. L. Rev. 1345, 1367 (1994).

It cannot be maintained that the notion of preference in favor of admitting expert testimony is inconsistent with the Federal Rules.

B. Close Scrutiny of Rulings Excluding Expert Testimony is Necessary to Preserve Access to Justice.

There are strong policy reasons that warrant closer scrutiny of decisions to exclude expert testimony. Because scientific evidence is often essential to a vindication of legal rights, a trial judge who erroneously rules such testimony inadmissible does not simply exclude a piece of evidence. This is frequently the deathknell of plaintiff’s cause of action.

One of this Court’s earliest pronouncements declared that “the very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). This right of access to justice is so fundamental that this Court has located “the duty of every State to provide, in the administration of justice, for the redress of private wrongs” in the Due Process Clause of the Fourteenth Amendment. *Missouri Pacific Ry. Co. v. Humes*, 115 U.S. 512, 521 (1885). See also *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429 (1982) (“The

Court traditionally has held that the Due Process Clauses protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances.”).

This Court’s decisions striking down state restrictions on providing legal services to potential plaintiffs have further recognized that “meaningful access to the courts is a fundamental right within the protection of the First Amendment.” *United Transportation Union v. State Bar of Michigan*, 401 U.S. 576, 585 (1971).

It is a fact of our justice system today that “in many sorts of civil litigation, the plaintiffs cannot satisfy their burden of proof without scientific evidence.” Margaret A. Berger, *Procedural Paradigms For Applying The Daubert Test*, 78 Minn. L. Rev. 1345, 1348 (1994). It is also a fact of life that in any given field of science, most of the qualified experts are employed by, or are engaged in research funded by manufacturers or corporations who are frequent defendants in such litigation. As one court has recognized, undue restrictions on expert testimony place an especially onerous burden on injured plaintiffs, who do not have access to the numbers of experts available to manufacturers. *Knight v. Otis Elevator Co.*, 596 F.2d 84, 88 (3d Cir. 1979).

Close scrutiny of rulings excluding expert testimony is appropriate to prevent judges who set the bar of admissibility too high from preventing aggrieved persons “from resorting to the courts to vindicate their legal rights. The right to petition the courts cannot be so handicapped.” *Brotherhood of Railway Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1, 7 (1964).

C. Close Scrutiny of Rulings Excluding Expert Testimony is Necessary to Preserve the Constitutional Role of the Jury.

The Seventh Amendment provides:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of common law.

U.S. Const., amend vii.⁵

The Seventh Amendment is specifically directed at the "otherwise autocratic power and authority of the judge." *Granfinanciera S.A. v. Nordberg*, 492 U.S. 33, 83 (1989) (White, J., dissenting).

Denial of the colonists' right to trial by jury was a primary grievance against the King, ultimately leading them to break free of England. Stephan Landsman, *The Civil Jury In America: Scenes From an Unappreciated History*, 44 Hastings L.J. 579, 595-97 (1993). Specifically, the American colonists complained bitterly of efforts by the Crown to shift the adjudication of civil and criminal disputes from colonial courts, where local juries sat, to Vice-Admiralty courts and other non-jury tribunals. See Roscoe Pound, *THE DEVELOPMENT OF CONSTITUTIONAL GUARANTEES OF LIBERTY* 69-72 (1957).

Strong objections to the absence of an explicit guarantee of the right to trial by jury sparked the Antifederalist demand for a Bill of Rights as a condition to ratification of the Constitution itself. See Joseph Story, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* 653 (R. Rotunda & J. Nowak eds. 1987)(1833); Edith Guild Henderson, *The Background of the Seventh Amendment*, 80 Harv. L. Rev. 289, 298 (1966); Charles Wolfram, *The Constitutional*

⁵ Congress has restated this guarantee even more forcefully for federal courts:

The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

Fed. R. Civ. Pro. 38(a).

History of the Seventh Amendment, 57 Minn. L. Rev. 639, 657-59 (1973). Alan Howard Scheiner, *Judicial Assessment of Punitive Damages, the Seventh Amendment, and the Politics of Jury Power*, 91 Colum. L. Rev. 142, 156-60 (1991).

The Antifederalists harbored grave fears that the new national government would necessarily fall under the control of a small elite of moneyed interests. There was no question that the unelected, life-tenured federal judiciary, "unencumbered by juries," would be selected from and would serve that elite against the interests of the people. 3 *THE COMPLETE ANTI-FEDERALIST* 49 (An Old Whig). Even well-intentioned judges can pose a danger to the rights of common people, the Antifederalists asserted, because judges will frequently have a bias toward those of their own rank. Landsman, *supra*, at 600. The civil jury, therefore, would serve as a bulwark against private as well as public oppression. Scheiner, *supra*, at 152.

The Seventh Amendment's restraint on judicial power continues to be vital. As Judge Patrick Higginbotham points out, "American federal courts . . . have a peculiar need for the democratizing influence of the jury" because an independent judiciary, essential to judicial review, also carries "its attendant risk of autocratic behavior." Patrick. Higginbotham, *Continuing the Dialogue: Civil Juries and the Allocation of Judicial Power*, 56 Texas L. Rev. 47, 52 (1977).

For this reason, this Court has historically championed the right to trial by jury and has viewed any infringement with great disfavor.

Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.

Dimick v. Schiedt, 293 U.S. 474, 486 (1953). Describing the right to trial by jury as "a great constitutional right", this Court stated that "it is only in exceptional cases and for specific causes that a party may be deprived of it." *Grand Chute v. Winegar*, 82 U.S. 373, 375 (1872). See also, *Lyon v. Mutual Benefit Assoc.*, 305 U.S. 484, 492 (1939) ("It is essential that the right to trial by jury be scrupulously safeguarded").

The gravitational pull of the Seventh Amendment necessarily affects appellate review in federal courts. This Court has cautioned that

because the federal courts operate under the strictures of the Seventh Amendment. . . . we are reluctant to stray too far from traditional common-law standards, or to take steps which ultimately might interfere with the proper role of the jury.

Browning-Ferris, Indus. v. Kelco, 492 U.S. 257, 279 n.26 (1989).

Amicus submits that erroneous exclusions of scientific evidence, unlike erroneous admissions, may effectively deprive plaintiffs of their right to trial by jury. Closer scrutiny of such decisions is therefore warranted to preserve that constitutional right. See *Ambrosini v. Labarraque*, 101 F.3d 129, 133 (D.C. Cir. 1996) ("When a court denies the right to have a jury decide a disputed issue, especially one of a scientific nature, its reasons for doing so must be strong.").

Because the guardianship of the respective roles of judge and jury necessarily falls to the judges themselves, the question arises: *Quis custodiet ipsos custodes?* — Who shall guard the guards themselves. Amicus submits that appellate courts must effectively exercise review to ensure that trial judges do not exceed their role.

The Third Circuit recognized this responsibility to scrutinizing decisions of trial judges that, if erroneous, may infringe upon the right to trial by jury:

[W]here no undesirable or pernicious element has occurred or been introduced into the trial and the trial judge nonetheless grants a new trial on the ground that the verdict was against the weight of the evidence, the trial judge in negating the jury's verdict has, to some extent at least, substituted his judgment of the facts and credibility of the witnesses for that of the jury. Such an action effects a denigration of the jury system and to the extent that new trials are granted the judge takes over, if he does not usurp, the prime function of the jury as the trier of the facts. It then becomes *the duty of the appellate tribunal to exercise a closer degree of scrutiny* and supervision than is the case where a new trial is granted because of some undesirable or pernicious influence intruding into the trial. Such a close scrutiny is required in order to protect the litigants' right to jury trial.

Lind v. Schenley Indus., Inc., 278 F.2d 79, 90 (3d Cir.) (in banc), cert. denied, 364 U.S. 835 (1960) (emphasis added).

Of similar import is Justice Black's caution in *Galloway v. United States*:

A verdict should be directed, if at all, only when, without weighing the credibility of the witnesses, there is in the evidence no room for honest difference of opinion over the factual issues in controversy. I shall continue to believe, that in all other cases a judge should, in obedience to the command of the Seventh Amendment, not interfere with the jury's function. Since this is a matter of high constitutional importance, appellate courts should be alert to insure the preservation of this constitutional right.

319 U.S. 372, 407 (1943) (Black, J., dissenting). The price of the lack of such vigilance may well be "the 'gradual process of judicial erosion which . . . has slowly worn away a major portion of the essential guarantee of the Seventh Amendment.'" *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 339 (1979) (Rehnquist, J., dissenting), quoting Justice Black in *Galloway*, 319 U.S. at 397.

III. FEARS OF JURY INCOMPETENCE TO ASSESS THE WEIGHT AND CREDIBILITY OF EXPERT TESTIMONY ARE UNFOUNDED.

The reluctance to allow the jury to perform its role in assessing the weight and credibility of expert testimony plainly reflects lack of confidence in the jury.

In this regard, respondent seems to us to be overly pessimistic about the capabilities of the jury and of the adversary system generally. Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.

Daubert, 509 U.S. at 596. See also *Barefoot v. Estelle*, 463 U.S. 880, 899 (1983) ("Petitioner's entire argument . . . is founded on the premise that a jury will not be able to separate the wheat from the chaff. We do not share in this low evaluation of the adversary process.")

The Court's confidence is well placed. Recent empirical studies 'strongly rebut[] the broad assumption that jurors are not competent to understand complicated scientific evidence.' Michael S. Jacobs, *Testing the Assumptions Underlying the Debate About Scientific Evidence: A Closer Look at Juror "Incompetence" and Scientific "Objectivity,"* 25 Conn. L. Rev. 1083, 1090, 1094-98 (1993).

Although "[c]oncerns about jury competence preceded the founding of the United States and have troubled scholars and jurors throughout the history of the American judicial system," and "although critics [of the jury system] have succeeded in forging agreement that juries perform poorly in some complex cases," courts, legislatures, and other rulemaking bodies "should consider such critics' reform proposals with skepticism." *Developments in the Law — the Civil Jury: The Jury's Capacity to Decide Complex Civil Cases*, 110 Harv. L. Rev. 1489, 1491 (1997). That conclusion

— and the Framers of the Seventh Amendment's faith in the competence of juries — is vindicated by modern social science research.

In summarizing five recent social science research projects concerning "jury competence in ordinary trials," Joe S. Cecil, Project Director in the Division of Research at the Federal Judicial Center, and Valerie P. Hans, Professor of Criminal Justice and Psychology at the University of Delaware, concluded that "doubts about jury competence expressed by jury critics stand in sharp contrast to the judgments of scholars who conduct research on jury decisionmaking." Joe S. Cecil, Valerie P. Hans, and Elizabeth C. Wiggins, *Citizen Comprehension of Difficult Issues: Lessons from Civil Jury Trials*, 40 Am. U. L. Rev. 728, 744-45 (1991). Indeed, "empirical evidence consistently points to the general competence of the jury" in such ordinary cases. *Id.* at 745.

Although research results regarding jury competence is more equivocal when juries are confronted with complex questions involving toxic torts, medical malpractice, expert scientific testimony, or complicated economic issues, there is no evidence that lay juries are more perplexed or less competent than lay judges. "[A] juror's evaluation of [complicated] evidence should not be compared to that of an expert in the field. The more likely alternative to the jury is the judge, and judges also fall prey to statistical errors." (footnotes omitted). *Id.* at 764. Researchers found "high rate of agreement between judges and juries" on questions of liability and damages in civil cases. *Id.* at 746.

See also Richard Lempert, *Civil Juries and Complex Cases*, in VERDICT: ASSESSING THE CIVIL JURY SYSTEM 235 (R. Litan ed. 1993) (social science evidence demonstrates that "we cannot assume that judges in complex cases will perform better than juries"); Neil Vidmar, *MEDICAL MALPRACTICE AND THE AMERICAN JURY: CONFRONTING THE MYTHS ABOUT JURY INCOMPETENCE, DEEP POCKETS, AND OUTRAGEOUS*

AWARDS 175-182 (1995) (summarizing empirical studies on judge-jury agreement in cases involving complex scientific evidence).

Indeed, a Federal Judicial Center study constituting "the first, and to date only, systematic examination of reported performance of jurors across a substantial number of demanding civil trials," "negates the image of bewildered, inattentive juries overwhelmed by complex evidence." Cecil, et al., *Citizen Comprehension*, 40 Am. U. L. Rev. at 750, 751.

See Shari Seidman Diamond and Jonathan D. Casper, *Blindfolding the Jury to Verdict Consequences, Damages, Experts, and the Civil Jury*, 26 Law & Soc. Rev. 513, 557 (1992) ("The evidence . . . is quite inconsistent with the model of the jury as a passive and malleable recipient of testimony. Moreover, even where the testimony is arcane, complex, and difficult to follow, jurors make conscientious and often successful efforts to deal with the substance of what they hear, and their decisions reflect such activity."); Lempert, *Civil Juries* at 234-35; Valerie P. Hans, *The Jury's Response to Business and Corporate Wrongdoing*, 52 Law & Contemp. Pblms. 177, 189 (1989) ("In experimental studies in which mock jurors were presented with scientific and quantitative evidence . . . the presentation of scientific evidence was not ignored, nor did it overwhelm other factors in jurors' judgments.").

In sum, "the overall picture of the jury that emerges from available data indicates that juries are capable of deciding even very complex cases. Cecil, et al., *Citizen Comprehension*, 40 Am. U. L. Rev. at 764.

Even recognizing the limitations of both judges and juries, prudence suggests that the jury is the preferable arbiter. Jury decisions do not become precedents — "when a court makes a scientific mistake, the consequences are far broader than if a jury makes the same mistake." Anthony Z. Roisman,

Conflict Resolution In The Courts: The Role Of Science, 15 Cardozo L. Rev. 1945, 1949 (1994).

Amicus suggests that the opportunities for improving juror understanding and performance have not been exhausted. Effective appellate review to protect the jury's role as factfinder continues to be appropriate, both as public policy and constitutional imperative.

CONCLUSION

For the foregoing reasons, Amicus Curiae urges this Court to affirm the judgment of the Court of Appeals.

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